

APPENDIX B

Regulatory Permit Guide

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Guide To Permit Requirements and Procedures For Hawaiian Fishpond Restoration

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The permitting and leasing requirements and procedures for Hawaiian fishpond restoration is described below. It has been adapted from information found in the Hawai'i Revised Statutes (HRS), John Bay (MBA International 1993b) and DHM (1990).

Because of their location in Hawaii's fragile coastal zone, Hawaiian fishponds are controlled by a regulatory framework where State, Federal and County governments each exercise some degree of control over the location and type of development. These requirements relate to the location of the operation, its historical and archaeological significance, its use of resources such as water, its effects on the environment, sanitation and other matters. These regulations are often complex, with overlapping jurisdiction between agencies and levels of government.

The following section provides a synopsis of the Federal, State and County permits that apply to the Moloka'i fishponds restoration effort. For each permit or regulation, the purpose, administering agency, application information requirements, public participation and sequencing requirements are provided. Anyone using this guide for a restoration project please note that these laws and regulations are subject to continual changes and (re)interpretation by those administering the permits. As such no synopsis can substitute for the statutes and regulations themselves, one should contact the agencies directly to discuss their requirements as they apply to any specific project.

FEDERAL PERMITS

DEPARTMENT OF ARMY PERMIT (DA)

Purpose. Under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), the Army Corps of Engineers (ACOE) and the Environmental Protection Agency have jurisdiction over discharge of dredged or fill materials into the "waters of the United States." "Waters of the United States" includes all navigable waters, plus all other waters such as lakes, rivers, streams, mud flats, sand flats, wetlands, and natural ponds, the use, degradation or destruction of which could affect commerce. In terms of Hawaiian fishponds, the regulatory definition specifically includes any body of water from which fish or shellfish are or could be taken and sold.

Under Section 404, a permit is required from the ACOE (a Department of Army Permit, i.e., DA Permit) prior to the discharge of any dredge or fill material in wetlands or other waters. The work involved in restoring a fishpond, movement of rock, reconstruction of walls and the use of machinery in and around ocean waters, will trigger the need for this permit.

It is the responsibility of the ACOE District Engineer to make the initial determination as to whether a project will affect wetlands. It is prudent to check with the ACOE early to obtain this determination as wetlands are subject to significant Federal regulatory protection which may inhibit the ability to restore a particular fishpond as envisioned.

In the process of considering an application for a DA permit, the application will be circulated to other Federal agencies, such as the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for endangered species concerns, and the Advisory Council on Historic Preservation for historic and archaeological concerns.

Information Requirements. The ACOE requires that the proposed work be physically described in sufficient detail so that its potential impact on the affected environment can be fully evaluated. Both narrative description and detailed plans and drawings are required.

Because fishponds are located in the State's Coastal Zone, before a DA Permit will be issued:

- a) The ACOE must obtain a determination that the project will be consistent with the Coastal Zone Management Program through that agency's issuance of a Coastal Zone Management Consistency Statement, and;
- b) The project will be consistent with State water quality standards through obtaining a 401 Water Quality Certification from the State Department of Health.

Issuance of a DA Permit is based on a "public interest review" which evaluates the probable impacts of a project, including its cumulative impacts, and its intended use. This decision process requires a balancing of the reasonable benefits that can be expected to accrue from an activity against its reasonable foreseeable detriments. All factors which may be relevant to a proposed activity are required to be considered including, but not limited to conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply, water quality, energy needs, safety, property ownership and, in general, the needs and welfare of the people.

Public Participation. A public notice soliciting comments on the permit application is issued within 15 days after the receipt of a complete application. The comment period on the application is 15 to 30 days from the date that the notice is issued; the period can be extended an additional 30 days. Depending on the complexity of the project, a public hearing may be required.

Processing Time. The DA Permit process varies with the scale and complexity of the proposed action. If all information requirements have been met and there are no substantive comments to the proposed action, a DA Permit can be issued 60 days after the receipt of a complete application. If an action is a controversial or complex project, issuance of a DA Permit can take one year or more.

Cost. For private parties \$10.00 will be charged for a permit for a non-commercial activity; \$100.00 will be charged for a commercial activity. No fees are charged for any activity authorized by a general permit or for permits to governmental agencies.

Administrating Agency. U.S. Army Corps of Engineers, Regulatory Branch, Pacific Division, Honolulu, Hawai'i

COASTAL ZONE MANAGEMENT CONSISTENCY STATEMENT

Purpose. The Hawaii Coastal Zone Management Act provides a broad set of goals, objectives and policies consistent with the Federal Coastal Zone Management Act. Federal law requires that Federal agencies conduct their planning, management, development and regulatory activities in a manner consistent with the State Coastal Zone Management Program (CZMP). Pursuant to Federal regulation, the State may review all Federal activities within the coastal zone for consistency with the CZMP. Because Federal agencies are involved in the restoration of the fishponds (through the requirement of an Army

Corps 404 permit), the Army Corps must get a certification from the Coastal Zone Management (CZM) Office (administered through the Office of State Planning) that the proposed activities are consistent with the State's (CZMP).

The CZMP's directive is to deal with protection, management, development, restoration and enhancement of coastal zone recreational, historic, scenic, open space, economic and ecosystem resources.

The Coastal Zone Management Area (Coastal Zone) is defined as all marine waters extending from the upper reaches of the wash of the waves on the shore seaward to the limit of the State's police power and management authority.

Information Requirements. The applicant must prepare an assessment of the proposed activity's effects on the Coastal Zone, its consistency (or conflicts) with the CZMP's objectives and policies; information regarding the status of any State and local environmental permits or reviews associated with the activity; and any supplemental information such as environmental review documents, plans and drawings.

Public Participation. Public notice of a consistency review is required and is generally provided in a Federal agency public notice.

Cost. No fee is required for the consistency review.

Administering Agency. State Office of Planning, Coastal Zone Management Program, Honolulu, Hawai'i.

DEPARTMENT OF HEALTH 401 WATER QUALITY CERTIFICATION

Purpose. Pursuant to the Federal Clean Water Act of 1977, the State of Hawai'i through the Department of Health, has been mandated to adopt specific water quality regulations and standards. In general, water quality standards apply to "ambient" conditions in streams, wetlands, and the oceans around Hawai'i. Historically, these standards have been applied based on the assumption that any change from ambient conditions is detrimental. Thus, ambient conditions for a particular project are generally defined as "water quality conditions that would occur in the receiving waters if these waters were not influenced by the new human activity." Because Hawai'i's coastal waters are generally low in nutrients and suspended material, the State's standards for these pollutants in the marine environment are relatively strict.

Accordingly, no project is allowed to lower the water quality below the State standards unless this change is "justifiable as a result of important economic or social developments, and will not interfere with an ongoing legal use of the waters. All waters shall be free of substances attributable to domestic, industrial, or other controllable sources of pollutants." For regulatory purposes, Hawai'i's marine waters have been divided into those that are relatively pristine (Class AA), and those that are not as pristine (Class A). Moloka'i fishponds are in AA waters.

Information Requirements. A Section 401 Water Quality Certification is a prerequisite for obtaining a Department of the Army Permit (described above). In essence, the applicant certifies that the proposed project will comply with State and Federal water quality regulations and must submit to the DOH appropriate data in support of this claim. Such data would include estimates of discharge quantity and quality, and a demonstration that the best practical methods of effluent treatment or control will be used. These data are reviewed by DOH, which publishes for public comment the proposed Water Quality Certification prior to its issuance.

The applicant must submit a complete description of the discharge involved, which shall include:

- Description of the facility or activity.
- The discharge from construction and operation.
- The characteristics of the discharge and the location of its entry into State waters. A description of equipment and facilities to control discharges.
- A description of the methods and means of monitoring, if applicable and any additional information requested.

Public Participation. The Director of the Clean Water Branch may provide public notice and an opportunity for public comment or hearing upon request or at the Director's own determination.

Cost. A private applicant must pay a fee of \$100.00. The applicant must also pay the costs of publication related to the notification of the required public hearings. For governmental agencies, the \$100.00 fee is waived; however, the agencies must pay for the publication of notice for the public hearings.

Processing Time. The Director is required to render a decision on the completeness of any application within 30 days of receipt. The Director shall render a decision on any complete application for a water quality certification within 150 days, (HRS. Chapter 342D, as amended per Act 177).

Administering Agency. Department of Health, Clean Water Branch, Honolulu, HI.

STATE PERMITS

CONSERVATION DISTRICT USE PERMIT (CDUP)

Purpose. An important State requirement is the Conservation District Use Application (CDUA), administered by the Department of Land and Natural Resources (DLNR) as part of its responsibility for the use of lands within the Conservation District where most publicly- and privately-owned Hawaiian fishponds are located.

The Land Use Law (Chapter 205 HRS) divides the State into four land use district classifications: Urban, (five percent of the State's land area); Agriculture, (47 percent); Conservation, (47 percent); and Rural, (less than one percent).

The Urban District consists of lands currently in urban use and reserved for future urban growth. The respective counties regulate and control the use of these lands.

The Agricultural District includes lands used for cultivation and grazing as well as related uses. Aquaculture is a permitted use within this district. Other uses within this district require a special permit. Special permits are handled by the respective county for uses requiring less than 15 acres. Special permits for projects larger than 15 acres are handled by the State Land Use Commission.

The Conservation District includes areas necessary for "protecting watershed, preserving scenic and historic areas; providing park lands, wilderness and beach reserves; conserving endemic plants, fish and wildlife, forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept" (HRS 205-2(e)). Included in the conservation district are shoreline areas, most submerged offshore lands and out-lying small islands. Most Hawaiian fishponds are in the Conservation district.

The Conservation District is broken down into four sub zones, Protective, Limited, Resource, and General. Aquaculture is a permitted use within the Resource and General sub zones.

Prior to any use of land in the Conservation District, a Conservation District Use Application submitted and approved by the Board of Land and Natural Resources (BLNR) is required.

Informational requirements. The application must contain:

- An Environmental Assessment or if required, an Environmental Impact Statement;
- Description of the location and boundaries of the area to be utilized, existing use, structures, utilities, access, vegetation, topography including shoreline features;
- Description of any covenants, restrictions, easements for the parcel;
- Survey of any historic site that may be affected by the proposed use, including a plan for protection, salvage or restoration;
- Statement of the reasons for selecting the proposed location;
- Description of the activities to be conducted, commercial or noncommercial, and a time frame for construction, operation of facilities, and planned levels of use;
- Proposed plans of the proposed development (where applicable these should include site and elevation plans, floor plans, drainage and grading plans and landscaping plans);
- For use of marine waters a statement on the extent to which the proposed activities will impact the use of marine waters for navigation, fishing and public recreation and a description of any enclosures, fences, stakes, buoys or structures proposed to mark the desired area.

Public Participation. In terms of fishponds, a public hearing is required for any proposal to use conservation lands for commercial use.

Processing Time. From the time that the application is submitted, the BLNR has 180 days to act on the proposal. If an EA or EIS accompanies the application, the period may be extended an additional 90 days with consent of the applicant or BLNR.

Cost. A fee of \$50.00 is required for each application submitted. If the application requires a public hearing, an additional \$50.00 is required.

Administering Agency. Office of Conservation and Environmental Affairs, State Department of Land and Natural Resources, Honolulu, Hawai'i.

ENVIRONMENTAL IMPACT STATEMENT (EIS)

Purpose. Under Chapter 343 Hawai'i Revised Statutes, a system of environmental review has been established at the State level to insure that proposed actions and the effects of proposed actions are given proper consideration in decision making along with economic and technical considerations on the economic and social welfare of the community and the State.

An EA is required for actions that are proposed by State and County agencies, as well as actions proposed by the private sector that require prior approval from an agency.

In terms of fishponds, the request for any proposed use of land within the Conservation District (CDUA) or within any historic site as designated in the National Register or Hawai'i Register of Historic Places as provided in the National Historic Preservation Act of 1966, triggers the 343 requirement.

Informational requirements. An EA must contain the following information:

- Identification of the applicant or proposing agency;
- Identification of the approving agency if applicable;
- Identification of agencies consulted in making the assessment;

- General description of the action's technical, economic, social, and environmental characteristics;
- Summary description of the action's technical, economic, social, and environmental characteristics;
- Summary description of the affected environment, including suitable and adequate location and site maps;
- Identification and summary of major impacts and alternatives considered, if any; proposed mitigation measures, if any;
- A determination of the need for an EIS, findings and reasons supporting determination;
- Agencies to be consulted in the preparation of the EIS, if applicable.

Public Participation. The Draft EA is made available for public comment for 30 days. Such notification of the project is accomplished through the publication of the summary in the monthly State of Hawai'i Office of Environmental Quality Control (OEQC) Bulletin. Public and agency comments generated by the public notice must be addressed by the party proposing the project. These concerns and responses are then included in the "Final EA." The Final EA is then reviewed by the lead public agency (see below); if it is ruled that the project will not have significant impact, it is given a negative declaration ("neg. dec."), otherwise the proposal will require an EIS.

In the latter scenario, an EIS Preparation Notice summarizing the proposed action and the reasons supporting the determination are prepared by the regulatory agency and published in the OEQC Bulletin.

With the publication of EIS Preparation Notice, the public has 30 days to request to be a consulted party during the Draft EIS preparation. After the Draft EIS has been published, the public has an additional 45 days to comment in writing. The applicant must respond to any public comments. Both the comments and responses are included in the Final EIS. Contents of the Final EIS include:

- Statement of the purpose and need for action;
- Project description;
- Description for any known alternatives for the action;
- Description of the environmental setting, including a description of the environment in the vicinity of the action, from both a local and regional perspective;
- Statement of the relationship of the proposed action to land use policies for the affected area;
- Statement of the probable impacts of the proposed action on the environment, which shall include all phases of the action and consideration of all consequences on the environment;
- Discussion of the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;
- Discussion addressing all irreversible and irretrievable commitment of the resources that would be involved in the proposed action;
- Discussion of all probable adverse environmental effects that cannot be avoided and the mitigation measures to reduce these impacts;
- Summary of all unresolved issues and either how these issues will be resolved or what reasons there are for proceeding without resolving the problem.
- A judgment as to the acceptability of the Final EIS must be made within 30 days of its submittal. This 30-day period may be extended at the request of the applicant an additional 15 days.
- Public participation. No public hearing is required, but generally one or more hearings are usually conducted, particularly in the case of controversial project proposals.

Processing Time. The time to complete an environmental review depends upon the complexity of the project and the number of State, federal, and local permits required. For example, the EA for one of the

demonstration project ponds took about six months to process. A major EIS on the other hand can take a year or more.

Cost. There is no filing fee.

Administering Agency. The State or County agency ("lead agency") to which the applicant first applies for any permit connected with the proposed project is responsible for determining the need for an EIS. For fishpond restoration, since the issue which triggers the need for an EA is the use of lands within the Conservation District, the Department of Land and Natural Resources, Office of Environmental Quality Control, administers the 343 process. The actual determination is made by the Board of Land and Natural Resources.

COUNTY PERMITS

SHORELINE MANAGEMENT AREA (SMA) PERMIT

Purpose. The SMA is shoreline and coastal water-related land ranging inland from the "shore-line" 100 yards or more, which has been designated by the counties. No development can occur within the SMA unless a permit is obtained from the County. Permits will only be granted if the development will not have substantial adverse impacts on the environment, is consistent with the State's CZMP and the County general plan and ordinances. Per HRS 205A-22, the use of land for the purposes of aquaculture and mariculture are specifically exempt from the definition. However, a major modification or reconstruction to fishponds in addition to construction of facilities needed for the aquaculture operation (such as storage facilities, maintenance building, and, research offices) may not be considered exempt.

In general, the type of fishpond can determine if a particular fishpond is located in the SMA. Both *loko kuapo* and *loko ume'iki* extend from the shoreline seaward and are outside the SMA. *Loko pu'uone*, *loko wai loko i'a kalo* and *kaheka* and *hapunapuna* are usually located inland from the shoreline. These fishponds usually lie within the SMA, although exceptions do exist.

Informational Requirement. Along with the completed application form, the following information is necessary:

- A tax map that identifies the property the applicant proposes to develop;
- A plot map of the property drawn to scale with all the proposed structures accurately depicted;
- If the parcel abuts the shoreline a certified shoreline survey is required. To be valid the survey must be prepared by a registered Land Surveyor and confirmed by the chairman of the Board of Land and Natural Resources;
- Written description of the proposed project and a statement of objectives;
- Statement of the project's valuation as estimated by an architect, engineer, or contractor licensed by the State;
- An Environmental Assessment (EA) or deemed necessary (Per HRS 343) an EIS.

Public Participation. A public hearing is required. If a Shoreline Setback Variance is also required, a joint public hearing will be held.

Cost. The filing fee is \$200 in the City and County of Honolulu and County of Hawai'i, and \$150 in the County of Kaua'i and County of Maui.

Administering Agency. The Shoreline Setback Variance is obtained from the respective County planning department. Moloka'i is under County of Maui jurisdiction.

SHORELINE SETBACK VARIANCE

Purpose. The intent of the shoreline setback law is to regulate uses and activities within the shoreline area to preserve and protect the natural shore and open space and to protect against encroachment of structures which may disturb the natural processes of the shoreline and cause erosion of the shoreline.

Anyone proposing to construct a structure in the shoreline area or otherwise physically alter the shoreline area is required to obtain a Shoreline Setback Variance. The "shoreline area" includes at least all of the land area between the shoreline and the shoreline setback line (not less than 20 feet and not more than 150 feet inland).

Information Requirement An applicant for a Shoreline Setback Variance is required to submit with the completed application form a Certified Shoreline Survey showing the actual field location of the shoreline in relation to the position of the proposed facilities. Detailed construction plans showing the design of the proposed structure and its relationship to property boundaries and existing topography in and adjacent to the subject property are also required.

A written statement describing how a proposed project is necessary for or ancillary to aqua- culture is also required. This statement should specifically address the relationship between aquaculture and each feature of the development proposal.

Public Participation. A public hearing is conducted with the request for the Variance. Should an SMA permit also be required, a joint public hearing will be held.

Cost. The filing fee is \$100 in the City and County of Honolulu, County of Kaua'i and County of Hawai'i, and \$150 in the County of Maui.

Administering Agency. The Shoreline Setback Variance is obtained from the respective County planning department. Moloka'i is under County of Maui jurisdiction.

GRADING, GRUBBING AND STOCKPILING PERMIT

Purpose. To control activities that alter land forms and which have the potential to change drainage patterns, destroy vegetation, cause erosion and produce unsafe or unsightly disfigurement of the landscape. This permit is applicable to anyone desiring to perform any excavation or fill or combination thereof, or grubbing, by which vegetation is removed or cleared from the surface ground.

Information Requirement. The information required for a Grading, Grubbing and Stockpiling Permit is normally presented in the form of a scale drawing, with explanatory and/or supplementary data annotated. An applicant is required to submit the following information:

- All pertinent terrain features;
- A layout and arrangement of the proposed works on a plan view;
- Representations to scale of typical cross-sections of cut and fill areas;
- Detailed topography both before and after work (i.e. existing and proposed elevations);
- Identification of erosion control measures;
- Estimates in cubic yards of the amount of excavation and embankment and the area in sq. ft of the land to be graded;
- If material is to be imported from the site, an indication of where the material will come from or where it will be deposited;

- A grading permit is also required, and a soils report may also be required in some cases:
- Where the graded area is 15,000 sq. ft or greater, a civil engineer should prepare the plan licensed with the State of Hawaii. If the project involves more than one acre of land, the applicant must also submit a temporary erosion control plan for review and approval by the administering department.
- A performance bond, in the amount equal to the cost of all work and service required to complete the project, is required for all projects involving the movement of more than 500 cubic yards of earth or for excavation and fills of over 15 feet in vertical height.

Public Participation. There is no mandatory requirement for a public hearing in connection with a Grading, Grubbing and Stockpiling Permit.

Permit Sequence. The Grading, Grubbing and Stockpiling Permit will not be granted until an applicant complies with all other environmental and regulatory requirements.

Public Participation. Not required.

Cost. The filing fee for the permit is based on the volume of earth moved or square feet of area denuded.

Administering Agency. The Grading, Grubbing and Stockpiling Permit is obtained from the respective County Department of Public Works. Moloka'i is under County of Maui jurisdiction.

BUILDING PERMIT

Purpose. The purpose of the building permit is to protect the health, safety and welfare of the public through the enforcement of various codes as provided by law including, zoning, building, housing, electrical and plumbing codes.

Anyone desiring to erect, construct, enlarge, repair, move, improve, convert, alter, remove, or demolish any building or structure is required to obtain a Building Permit prior to undertaking the activity.

Actions related to fishponds that could potentially require a building permit include construction or reconstruction of fences and walls and the development of any accessory building, roadways or structures.

Public Participation. Not required.

Cost. The filing fee for a Building Permit is tied to the value of the proposed project. Administering Agency. The Building Permit is obtained **Administering Agency.** The Building Permit is obtained from the respective County Public Works Department. Moloka'i is under County of Maui jurisdiction.

STATE LEASE MECHANISM

The disposition of public lands can be through a long-term lease or a revocable permit on a month-to-month basis. The State and potential lessees prefer a lease as restoring and reviving the production capabilities of an ancient fishpond necessitate a long-term and stable commitment from both parties and the proof of such commitment to secure financing, insurance and other necessary formalities. The disposition of public lands is administered by DLNR -Land Management Division.

Unlike other State lands that must be disposed by public auction to the highest bidder, obtaining a lease to a State-owned fishpond can be through direct negotiation. This recent (1992) change to HRS 171-59 allows for the preferential treatment of awarding fishpond leases. The intent was to enable those with familial or cultural ties to a particular fishpond the opportunity to lease it rather than to award it strictly to the highest bidder.

General provisions for the disposition of a State-owned fishponds include the following:

- Lease term no greater than sixty-five (65) years in duration, subject to renewal by mutual agreement.
- Criteria to receive lease awards. Criteria are formulated to establish who is eligible to apply for a fishpond lease. The intent is to assure that whoever is awarded the use of these public lands will carry through with their intentions and has the skills, manpower, commitment and/or resources to do so.

The criteria would be published along with the public notification of the availability of a fishpond(s) for lease. The potential lessee would have 45 days from the public notice to submit an application stating that they meet the criteria qualifications. Discussions with Land Management indicate that reasonable criteria would include:

1. Parties must show prior experience with and/or willingness to obtain training in the procedures necessary to operate and maintain a successful aquaculture or fishpond facility. These skills include fish feeding, harvesting, water quality maintenance and fish stocking.
2. Parties must show prior experience in or ability to procure expert assistance in the historic art of fishpond restoration. Such expertise includes historically accurate stone-wall masonry construction techniques, placement and construction of *mukuhus*, mangrove mitigation measures, etc.
3. Parties must show the organizational capacity to amass a volunteer or otherwise committed work force so as to carry out the proposed restoration project on Moloka'i within a reasonable time frame.
4. The applicant that meets the criteria is given tentative approval to receive a lease, subject to obtaining all necessary Federal, State and County permits and conditions. Should there be more than one applicant who meets the criteria, the lease will go to auction and be awarded to the highest bidder.

Appraisal. Forgoing the auction method for public land disposition necessitates alternative methods to establish fair market value of the fishpond for lease rents. Therefore an independent appraisal is necessary. Cost of appraisal is \$800-1,000.

Rents. Currently the State is leasing LokoWaka pond in south Hilo for commercial use. The Nakagawa family has leased this 51 acre *loko pu'uone* since 1941. In 1994 the lease was renegotiated and extended for an additional seven years. Lease rent is \$1,400 per year, payable in semi-annual installments. It is the only State-owned fishpond in Hawai'i currently under lease.

Lease rents may be waived by the Board for up to two years-until the pond is productive. Other requirements to obtain a lease include:

1. Metes and bounds survey;
2. Form 78 -State and county comments to proposed lease;
3. Right-of-entry permits;
4. Public hearing conducted on Moloka'i;
5. Appropriate insurance coverage.

